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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through THE DEPARTMENT OF TRANSPORTATION,	)
Petitioner,	)
vs.	)
THE UNITED STATES OF AMERICA,	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

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vs.

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Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Claims entered in the above-entitled case on March 23, 1977.

OPINIONS BELOW

The Court of Claims case entitled The People of the State of California, acting by and through the Department of Transportation v. United States is reported as 551 F.2d 843 (1977) and appears in Appendix A.

JURISDICTION

This Petition for Writ of Certiorari is being filed within ninety (90) days of the date of entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. section 1255(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Transportation, acting by and through the Federal Highway Administration, has the authority to enact policy and procedure memoranda which require the states to deny just compensation to the owners of property taken for public use.

2. Whether the law of California governs what costs are reimbursable because California law is incorporated into federal law and PPM 21-4.1, paragraph 3a(2).

THE STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

1. The Fifth and Fourteenth Amendments to the United States Constitution and article I, section 14 of the California Constitution (currently renumbered art. I, § 19) are set forth in Appendix B.

2. Sections 101(a), 106(a) and 120(c) of Title 23 of the United States Code (part of the Federal-Aid Highway Act) are set forth in Appendix C.

3. Policy and Procedure Memoranda 21-4.1, paragraph 6u, 80-1, paragraph 51, and Federal-Aid Highway Program Manual, volume 7, chapter 2, section 2 are set forth in Appendix D.

STATEMENT OF THE CASE

This action was brought by the State of California, acting by and through its Department of Transportation, hereinafter referred to as "California", to recover the sum of $158,941.68 based upon the contractual obligation of the United States imposed by 23 U.S.C. section 106(a). California, in preparation for the construction of Interstate Highway 280, within the city limits of San Jose, entered into an agreement with the Franklin-McKinley School District of Santa Clara County for the purchase of McKinley School. California, in purchasing this facility, recognized that public facilities are not bought and sold in the market, nor are they operated for profit, and, therefore, paid the school district for the replacement cost of a new facility so that the

school district would have a school of equal utility to replace the school taken by the highway pro'ect.

The Court of Claims' jurisdiction was invoked under 28 U.S.C. section 1491. The Court of Claims granted defendant's cross motion for summary judgment and denied plaintiff's motion for summary judgment on March 23, 1977.

REASONS FOR GRANTING WRIT

I

INTRODUCTION

Petitioner submits that the Court of Claims has decided an important question of constitutional law relating to just compensation adversely to principles established by the Federal Government under the Fifth Amendment, the states under the Fourteenth Amendme t, and adversely to article I, section 14 of California's Constitution.

Petitioner further asserts that the Court of Claims, in upholding the validity of Policy and Procedure Memorandum 21-4.1, paragraph 6u, has decided the issue according to a federal policy which conflicts with the law of California. This raises important questions for all the states concerning the manner in which the costs of construction of a federal-aid highway project should be reimbursed under the provision of 23 U.S.C. section 106. California submits that the costs of right-of-way for which a state is reimbursed are those costs incurred pursuant to and in conformity with the applicable state law. The Court of Claims not only disregards California law but confers upon the Secretary of Transportation the power to review <u>all</u> of the State's costs of right-of-way.

II

ARGUMENT

1. THE SECRETARY OF TRANSPORTATION, ACTING BY AND THROUGH THE FEDERAL HIGHWAY ADMINISTRATION, HAS ENACTED POLICY AND PROCEDURE MEMORANDA WHICH CONFLICT WITH DECISIONAL LAW WHICH HAS DETERMINED THAT PAYMENT OF JUST COMPENSATION IS A CONSTITUTIONAL RIGHT.

The policy and procedure memorandum which the Federal Highway Administration and the Court of Claims held to be determinative of payment is PPM 21-4.1, paragraph 6u, dated December 30, 1960, which reads as follows:

> "The amounts required to be paid for lands in public ownership shall be justified in the same manner and to the same extent as though the

acquisition involved a private owner."

The Court of Claims, in interpreting this provision, relied upon the contractual agreement between the Federal Government and California under 23 U.S.C. section 106(a). This contract is in the form of the "Federal-Aid-Project Agreement" dated August 14, 1967, and under which California agreed to comply with the terms and conditions set forth in Title 23, United States Code, the regulations issued pursuant thereto and the "policy and procedures promulgated by the Federal Highway Administration" relative to the project.

California's position is that PPM 21-4.1, paragraph 6u, does not require that the State use the same appraisal methods for acquiring property in public ownership as for acquisitions from

private owners. The correct analysis of this memorandum would require the State to pay just compensation to both public and private owners and to furnish documentation justifying acquisition from both public and private owners.

To reach the conclusions drawn by the Federal Highway Administration and the Court of Claims you must completely ignore the requirements of the Fifth Amendment as applied in eminent domain proceedings to actions by the Federal Government, the Fourteenth Amendment as applied to land acquisitions by the various states, and California's own article I, section 14, which adopts the same just compensation standards as the Fourteenth Amendment.

The fundamental goal in all eminent domain proceedings is to pay just compensation for the property acquired. To

enact legislation or, as in this action policy and procedure memoranda which would give less than just compensation, is invalid. (United States v. Indian Creek Marble Co. (D.C. Tenn. 1941) 40 F.Supp. 811.) California urges that PPM 21-4.1, paragraph 6u, in requiring the State to use the Standard of Fair Market Value in the acquisition of public and private ownerships, deprives the public ownerships of the benefit of functional replacement.

California has consistently maintained that PPM 21-4.1, paragraph 6u, when it deprives a school district of just compensation under the Federal-Aid Highway Act, is violative of federal and State concepts of just compensation. (United States v. Miller (1943) 317 U.S. 369, 380.)

In United States v. Certain Property in Borough of Manhattan (2d Cir. 1968)

403 F.2d 800, the court stated the law regarding the acquisition of public improvements in this manner, at pages 802-804:

> "Under the Fifth Amendment, the owner of property in every condemnation case is entitled to 'just compensation.' The standard formulation for applying this Constitutional requirement is 'indemnity, measured in money, for the owner's loss of the condemned property.' Westchester County Park Commission v. United States, 143 F.2d 688, 691 (2 Cir.), cert. denied, 323 U.S. 726, 65 S.Ct. 59, 89 L.Ed. 583 (1944). The owner 'is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must

be made whole but is not entitled to more.' Olson v. United States, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934). In most cases the concept of 'market value,' i. e., what a willing buyer (one not forced to buy) would pay to a willing seller (one not forced to sell), is applied. The standard of fair market value--particularly with private condemnees --has proven practical and effective. Its variations are adaptable to many common situations: the comparable sales approach when the tract is one in an active commercial market; the capitalization of earnings standard for income-producing property, and the

reproduction cost minus depreciation measure of compensation if the building is a rarely traded speciality.

"The principle of fair market value, however, 'is not an absolute standard nor an exclusive method of evaluation.' United States v. Virginia Electric & Power Co., 365 U.S. 624, 633, 81 S.Ct. 784, 791, 5 L.Ed.2d 838 (1961). It should be abandoned 'when the nature of the property or its uses produce a wide discrepancy between the value of the property to the owner and the price at which it could be sold to anyone else.' United States v. Certain Land in Borough of Brooklyn,

346 F.2d 690, 694 (2 Cir. 1965). Frequently when public facilities are appropriated, the market value test is unworkable because these facilities are not commonly bought and sold in the open market, and seldom are operated for profit. Note, Just Compensation and the Public Condemnee, 75 Yale L.J. 1053 (1965). The result has been the development of the 'substitute facilities' doctrine to meet the unique needs of public condemnees. [Citations omitted.] <u>Simply stated, this rule insures that sufficient damages will be awarded to finance a replacement for the condemned facility</u>.

"The government argues that the substitution test is an 'exception' to the standard market value rule to be applied only when the condemnation involves a public road, sewer, bridge, or similar nonsalable service facility. Since the value of the land and building in the instant case was ascertainable by the market value concept, it contends that all damages compensable under the Fifth Amendment were awarded. We disagree.

"The 'substitute facilities' doctrine is not an exception carved out of the market value test; it is an alternative method available

in public condemnation proceedings. United States v. City of New York, 168 F.2d 387, 390 (2 Cir. 1948); State of California v. United States, 395 F.2d 261, 266 (9 Cir. 1968). When circumstances warrant, it is another arrow to the trier's bow when confronted by the issue of just compensation.

"When the public condemnee proves there is a duty to replace a condemned facility, it is entitled to the cost of constructing a functionally equivalent substitute, whether that cost be more or less than the market value of the facility taken. City of Fort Worth v. United States, supra,

188 F.2d at 223; Town of Clarksville v. United States, supra, 198 F.2d at 243. The duty may be legally compelled or one which arises from necessity, United States v. Des Moines County, supra, 148 F.2d at 449; the distinction has little practical significance in public condemnation. Insight into the usefulness and worth of community property may be gained as well from the responsible decisions of public officials and agencies acting under a broad mandate with discretionary powers, as from legislative determinations announced in statutes. Modern government requires that its administrators be

vested with the discretion to assess and reassess changing public needs. If application of the 'substitute facilities' theory depended on finding a statutory requirement, innumerable non-legal obligations to service the community would be ignored. Moreover, the 'legal necessity' test, applied woodenly, may provide a windfall if the condemned facility, though legally compelled, no longer serves a rational community need. <u>We hold, therefore, that if the structure is reasonably necessary for the public welfare, compensation is measured not in terms of 'value' but by the loss to</u>

<u>the community occasioned by the condemnation</u>." (Emphasis added.)

In <u>Town of Clarksville, Va.</u> v. <u>United States</u> (4th Cir. 1952) 198 F.2d 238, the court dealt with condemnation of a part of a town's sewer system and held that the taking might be compensated by paying the cost of a substitute. In dealing with this matter, Judge Dobie, speaking for the court, said at pages 242-243:

> "The general principles applicable to an eminent domain taking of municipal facilities are well established. The taking may be justly compensated by payment of the cost of a substitute, so long as a full equivalent is afforded for the property taken. [Citations omitted.] Of course, the interests of the public,

upon which the payment burden rests, are at stake, too and the award must not be in excess of strict equivalence. Yet we are not here dealing with a rigid, blind measure, that grants compensation only on a pound of flesh basis, but rather with an equitable concept of justice and fairness that accords with the Fifth Amendment's mandate. Accordingly, the equivalence requirement which must be met with respect to the substitute facility is more that of utility than of mere dollar and cents value. Jefferson County v. Tennessee Valley Authority, 6 Cir., 146 F.2d 564. <u>And the substitute facility must be that which</u>

<u>the claimant is legally required to construct and maintain, whether or not this type be more expensive or efficient than the facility which was condemned</u>. [Citations omitted.]" (Emphasis added.)

The State is at a loss to understand the strict adherence to the standard fair market value rule when the overwhelming weight of authority indicates that the "substitute facilities" rule should be used to meet the just compensation requirements of the Fifth Amendment. In <u>State of California</u> v. <u>United States</u> (9th Cir. 1968) 395 F.2d 261, at page 266, the court described the rule in this manner:

"The rule requiring the payment of the cost of 'substitute facilities' is an

application of these principles, not an exception to them. It enables the court or jury to award the amount required as just compensation in situations where market value or other standards of valuation cannot rationally be applied or where their application would not put the owner 'in as good a position * * * as if his property had not been taken.' It cannot, consistently with the Fifth Amendment, be used to deny an owner compensation when a taking has inflicted loss. We have been cited to no case permitting such a use of the rule, and a suggestion by the United States that it might be so

employed was expressly rejected in United States v. City of Jacksonville, Arkansas, 257 F.2d 330 (8th Cir. 1958).

"The district court's ruling limiting the State of California to proof of need for substitute facilities was therefore error. The State was prejudiced if loss from the taking might have been established by other evidence."

Another case which deals directly with the condemnation of public facilities is City of Wichita v. Unified School District No. 259, 201 Kan. 110, 439 P.2d 162. This case dealt with the condemnation of a school for highways purposes. The school in that action had been constructed in 1918 with additions built in 1951 and 1955. The court in

that action, while quoting both case law and text writers, stated the following at page 168:

"We believe the cases generally hold that where a public body sustains the loss of a facility essential to the performance of its public function, it is entitled to receive such compensation as will put it in as good a position pecuniarily as if its property had not been taken. (Mayor and Council of City of Baltimore v. United States, 4 Cir., 147 F.2d 786.) In United States v. State of Arkansas, 6 Cir., 164 F.2d 943, the court put it this way:

"'* * * The fundamental principle is that the public

authority charged with furnishing and maintaining the public way, whether it be a highway, a street or a bridge, must be awarded the "actual money loss which will be occasioned by the condemnation * * *" This amount is usually the cost of furnishing and constructing substitute roads. * * *' (p. 944.)

"This principle contemplates that replacement costs are not to be diminished by deductions for depreciation or obsolescence. In City of Fort Worth, Tex. v. United States, 5 Cir., 188 F.2d 217, where the taking of city streets was involved, the court stated:

"'* * * The cost of adequate substitute facilities to be so computed, <u>is proper whether such sum be more or less than the value of the street and facilities taken</u>. U. S. v. Los Angeles County, supra. We think the true rule in such cases is well stated in Jefferson County v. Tennessee Valley Authority, supra, 146 F.2d 564, 565, that "The practical view is to consider the road and highway needs of the civil division affected by the taking and to allow the governmental unit such sum in damages <u>as will pay the cost of road facilities equal</u> * * * <u>to those destroyed</u>. * * *' (Emphasis supplied) (p. 223.)"

A. Policy and Procedure Memorandum 21-4.1, Paragraph 6u, Has Been Superseded.

The policy and procedure memorandum under which California was denied reimbursement is PPM 21-4.1, paragraph 6u, dated December 30, 1960.

This provision was changed when PPM 80-1, paragraph 51, became effective in November 1968. If this paragraph had been in effect in 1965, the State would have had an opportunity to demonstrate that a functional replacement of the facility was necessary to protect the public's interest and collect the full reimbursement.

Subsequently, even this policy was liberalized to provide functional replacement of real property in public ownership by the Federal-Aid Highway Program Manual effective May 29, 1974,

paragraph 5a, volume 7, chapter 2, section 2.

It should be noted that policy and procedure memoranda are not law and, in fact, the United States Department of Transportation does not consider that its Federal Highway Agency's policy and procedure memoranda have even the status of regulations (23 C.F.R. § 1.32(a) (1977); Lathan v. Brinegar (9th Cir. 1974) 506 F.2d 677). Further, the Supreme Court in Red Lion Broadcasting Co. v. F. C. C. (1969) 395 U.S. 367, referred to "the venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. ...". In the instant case, what can be more indicative that the policy and procedure memorandum was wrong,

than a change of that very regulation when litigation is pending challenging its validity.

The McKinley School was an operating facility with two school buildings constructed in 1959 and two constructed in 1961. It is a recognized fact that when public facilities are appropriated the market value test is unworkable because these facilities are not bought and sold in the open market, nor operated for profit. The result has been the development of the "substitute facilities" doctrine to meet the unique needs of public condemnees. This rule simply stated ensures that sufficient moneys will be awarded to replace the condemned facility (see e.g., United States v. Certain Property in Borough of Manhattan, supra; City of Fort Worth, Tex. v. United States (5th Cir. 1951) 188 F.2d 217). The State recognized this

principle and paid the school district the replacement cost of a new facility, as opposed to the depreciated value of the appraised school facilities, so that the school district would have a school of equal utility to replace the school taken by the highway project. If the State had not paid the additional $158,941.68, it would be tantamount to asking the school district to underwrite the highway system by that amount. The highway system is financed by all users and asking the taxpayers of this school district to pay an additional amount would in effect be a subsidization of the construction of this highway.

2. THE LAW OF CALIFORNIA GOVERNS WHAT COSTS ARE REIMBURSABLE BECAUSE CALIFORNIA LAW ON THE SUBJECT IS INCORPORATED INTO FEDERAL LAW AND PPM 21-4.1, PARAGRAPH 3a(2)

A. The Court of Claims Was Bound To Apply California Just Compensation Principles.

The concept of the "substitute facilities" doctrine is applied in California when public facilities are acquired when it is the only method which will restore the condemnee to his precondemnation position. This concept is entitled to reimbursement according to PPM 21-4.1, paragraph 3a(2), which obligates the United States to participate in right-of-way costs of the State that are incurred "pursuant to and in conformity with State law."

B. PPM 21-4.1, Paragraph 6u, As Applied By the Court of Claims Is Not Consistent With 23 U.S.C. Section 120(c).

PPM 21-4.1, paragraph 6u, is not consistent with 23 U.S.C. section 120(c).

The term "total" in 23 U.S.C. section 120(c) has a plain meaning. It means "whole, entire." Webster's Third Int. Dictionary, p. 2414. It means "not divided, lacking in no part, full, complete, the whole amount." Black's Law Dictionary, 4th Edition, p. 1661. See also: Piedmont Publishing Co. v. Rogers (1961) 193 Cal.App.2d 171, 188. Words used in a statute without limiting definition and without a legislative history indicating a contrary definition should be given their common and ordinary meaning. C. I. R. v. Brown (1965) 380 U.S. 563, 570, 571; Malat v. Riddell (1966) 383 U.S. 569, 571; Dobbs v. Train (N.D. Ga. 1975) 409 F.Supp. 432, 436. The legislative history of Title 23 does not indicate that the word "total" should mean other than "the whole amount," and in fact the history supports this meaning.

One aim of Congress in revising, codifying and enacting into law Title 23 of the United States Code was to bring clarity and conciseness into the laws applicable to the Federal-Aid Highway program. 1958 U.S. Cong. & Admin. News, p. 3944. A further goal of Congress in enacting the Federal-Aid Highway Act was that the United States pay 90 percent of the cost of the interstate highway system. 1959 U.S. Cong. & Admin. News, p. 2734. In 1968, the United States expanded its participation in advance acquisition of rights-of-way costs to include the entire costs of property management expenses as well as related moving and relocation expenses. 1968 U.S. Cong. & Admin. News, p. 3506; 23 U.S.C. section 108(2); 1966 U.S. Cong. & Admin. News, p. 2834.

The history of the present Federal-Aid Highway Act begins in 1916. The congressional purpose of the present act

is clear: to provide a clear and concise law to administer; to provide 90 percent of all necessary funds to the states for construction of interstate highways; and to expand federal participation for various items of cost involved in the acquisition of rights-of-way. Therefore, if there is any doubt as to the meaning of "total" as it relates to this issue, the doubt should be resolved in favor of its plain meaning: the whole amount.

Thus, from a reading of Title 23 as a whole, from information found in the congressional news reports, and from the plain language of Title 23, the intent of Congress is established that the United States participate in the total interest costs in question.

PPM 21-4.1, paragraph 6u, is therefore outside the authority of the Secretary's powers to make regulations or interpretive rules. To paraphrase the

court in Tullock v. State Highway Commission of Missouri (8th Cir. 1974) 507 F.2d 712, 716, the federal policy in question, PPM 21-4.1, paragraph 6u, goes beyond the specific language of 23 U.S.C. section 120(c) and must be struck down.

CONCLUSION

California has demonstrated that the provision relied upon by the Federal-Aid Highway Act in denying California reimbursement in the amount of $158,941.68 was a denial of just compensation principles applicable to the Federal Government by the Fifth Amendment and to state governments by the Fourteenth Amendment and California's own Constitution provision, article I, section 14, which contains the same requirements as the Fourteenth Amendment.

It should also be noted that prior to the filing of this action and approximately three years after the State had

contracted with McKinley School, the Federal Highway Administration distributed PPM 80-1, paragraph 51, which provided that in public acquisition, it is permissible to provide functional replacement. The present provision is now contained in Federal-Aid Highway Program Manual, volume 7, chapter 2, section 2, which allows functional replacement to the extent practicable under State law. What better evidence exists that PPM 21-4.1, paragraph 6u, was improper from its effective date until its repeal in approximately November of 1968 than the continued existence of policies which allow functional replacement? It also emphasizes that State law is the standard under which reimbursement must be dispensed.

The McKinley School was less than six years old at the time of acquisition by the State and as noted in Appendix E, the agreement of acquisition itself

required "a new school of comparable utility, so as to leave the School District, upon completion of construction of the new school, in the same relative position as it was prior to the acquisition of the McKinley School." Again, what better evidence that a functional replacement was necessary to place the condemnee in the same position pecuniarily as if his property had not been taken?

California has also shown that where costs of right-of-way are concerned, such costs are determined by reference to the applicable State law. For these reasons California prays that the Writ of Certiorari be granted and the decision of the Court of Claims be reversed.

DATED: June 17, 1977.

Respectfully Submitted,

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